



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 19, 2004

Ms. Deena Wallace
Associate General Counsel
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2004-3131

Dear Ms. Wallace:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199655.

Texas A&M University-Corpus Christi (the "university") received a request for "a copy of the latest available University Bookstore 2004 Spring Booklist Report by Course and 2004 Spring Booklist Report by Author. Please include new and used price information and estimated sales figures." You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You inform us that the "University Bookstore is an auxiliary enterprise, and as such, it is required to be financially self-supporting and is required to generate approximately \$465,000 in additional revenue for [the university's] operating budget." *See* Gov't Code § 2252.061(1) (defining auxiliary enterprise as "a business activity that is conducted at a state agency, provides a service to the agency, and is not paid for with appropriated money"). You indicate that the requestor's bookstore competes with the university bookstore in providing text books for students. Having considered your representations and arguments, we find that you have demonstrated that the university bookstore has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. *See* ORD 593.

We next address whether release of the submitted information would harm the university bookstore's marketplace interests. You assert that a competitor could use "the work product generated with [the university's] limited resources to determine which books sold best, then stock and sell those books, resulting in deteriorating sales in the University Bookstore." You further contend that a competitor could use the requested information "in determining the University Bookstore's profit margin per item and then using the information to undercut the prices charged by the University Bookstore, thereby deteriorating sales." Having considered your arguments, we conclude that you have shown that release of the submitted information will bring about specific harm to the university bookstore's marketplace interests. *See* ORD 593.

We note, however, that the requestor indicates, and has submitted documents showing, that he has already received some of the submitted information. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989). Section 552.104 is a discretionary exception to disclosure and may be waived; this exception does not make information confidential. *See* Open Records Decision No. 592 at 8 (1991) (governmental body may waive predecessor to section 552.104), 522 at 4 (1989) (discretionary exceptions in general). Therefore, the university may withhold the submitted information pursuant to section 552.104 only to the extent it has not previously been voluntarily released to a member the public. To the extent the university has voluntarily made any of this information available, such information must be released as the university does not cite, and we are unaware of, any law that makes this information confidential.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

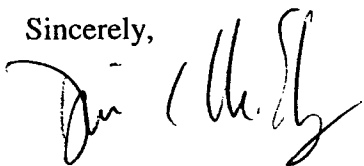
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 199655

Enc. Submitted documents

c: Mr. Victor Ruiz, IV
The Islander Bookstore
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Corpus Christi, Texas 78412
(w/o enclosures)